

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WILLIAM EDWARDS**  
Claimant

VS.

**SEDGWICK COUNTY**  
Respondent  
Self-insured

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Docket Nos. 241,094  
241,095 & 241,096

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge John D. Clark on October 26, 1999. The Appeals Board heard oral argument April 26, 2000.

**APPEARANCES**

Paul V. Dugan, Jr., of Wichita, Kansas, appeared on behalf of claimant. E. L. Lee Kinch of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

This appeal involves three claims consolidated for trial. Respondent has stipulated that all three alleged injuries arose out of and in the course of claimant's work as deputy sheriff for Sedgwick County, but respondent either denies that the injury resulted in permanent disability or contends the disability is less than found by the ALJ.

Docket No. 241,094 concerns a right knee injury that occurred on December 19, 1996, during a fight with a prisoner. On this claim, the ALJ awarded claimant benefits for a 2 percent impairment to the right lower extremity. Respondent argues that this injury did not cause permanent disability.

Docket No. 241,095 involves bilateral knee injuries that occurred on February 20, 1997, when claimant slipped on ice while escorting prisoners. The ALJ awarded benefits for 8 percent general body disability. In this case respondent argues, based on the opinion of the treating physician, Dr. Naomi N. Shields, that claimant suffered only a 2 percent permanent disability.

Docket No. 241,096 involves injury to claimant's cervical spine, right shoulder, and right knee. This injury occurred on August 14, 1997, when claimant became pinned in an automatic door. On this claim, the ALJ found claimant sustained a 15 percent general body impairment and awarded benefits on that basis while claimant continued to work for respondent in an accommodated position. As of the date claimant left employment with respondent, the ALJ found the disability increased to a 42.47 percent work disability. Here, respondent argues that claimant voluntarily retired and should be limited to functional impairment. Respondent also argues the impairment should be less than the 15 percent the ALJ found.

The issues on appeal are:

1. What is the nature and extent of claimant's disability?
2. For Docket No. 241,096 the issues include the amount of credit for retirement benefits under K.S.A. 44-501(h).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds the Award in Docket No. 241,094 should be reversed and no permanent disability benefits awarded. In Docket No. 241,095, the Award should be modified to 4 percent of the whole body. In Docket No. 241,096, the Award should be modified to 35.5 percent work disability with retirement benefits deducted.

#### **Docket No. 241,094 Findings of Fact**

1. Claimant began working for respondent in July 1975. He worked initially as a road patrol officer and then, in February 1992, began working in the warrants and judicial section. In December 1996, he was working as a courtroom guard.
2. In October 1996, claimant underwent surgery on his right knee for an injury that was not work related. The surgery, knee arthroscopy with meniscectomy through the lateral and medial meniscus, was performed by Dr. Shields. After this surgery, Dr. Shields released

claimant to full duty without restrictions and claimant was able to perform his regular work without pain.

3. On December 19, 1996, claimant re-injured his right knee in a fight with a prisoner. Claimant was again treated by Dr. Shields. Treatment after this injury consisted of pain medication and therapy. At claimant's request, Dr. Shields released claimant, again without restrictions, as of January 7, 1997. Dr. Shields did not believe this injury resulted in any permanent impairment.

4. The Board finds the right knee injury of December 19, 1996, did not result in any additional permanent impairment. This conclusion is based on the opinion of the treating physician and the claimant's testimony. As above indicated, Dr. Shields concluded the injury caused no permanent impairment. Dr. Shield's opinion was, in effect, supported by claimant's testimony. The claimant testified that after this injury his knee pain decreased to the level it was before the injury. He also testified his "knee felt fine." Although he also later testified to some continuing pain, claimant's testimony, in general, indicates this injury did not cause additional impairment.

Dr. Jane K. Drazek did assign a portion of claimant's impairment to the injury of December 19, 1996. Dr. Drazek testified claimant has an 8 percent impairment to his right lower extremity. She assigned one-quarter of this 8 percent to each of four injuries. The four injuries were the October 1996 injury (not work related) and the three subsequent work-related injuries of December 19, 1996; February 20, 1997; and August 14, 1997. But Dr. Drazek also acknowledged that the apportionment of her overall 8 percent rating was difficult, nearly impossible, and it appears her opinion on apportionment was little more than conjecture.

The Board concludes, based on the record as a whole, that claimant suffered no permanent impairment from the December 19, 1996 accident.

### **Conclusions of Law**

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a).

2. Claimant has not proven by a preponderance of the credible evidence that he sustained permanent disability as a result of the work-related accident of December 19, 1996.

3. Claimant is entitled to payment of medical expenses for authorized treatment for the injury of December 19, 1996, unauthorized medical expenses up to the statutory maximum, and future medical expenses upon proper application and approval by the Director.

4. Claimant is not entitled to permanent disability benefits for the accidental injury of December 19, 1996.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on October 26, 1999, should be, and hereby is, reversed and benefits for permanent disability denied on Docket No. 241,094.

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### **Docket No. 241,095 Findings of Fact**

1. Findings of fact made for Docket No. 241,094 are incorporated here by reference.
2. On February 20, 1997, claimant injured both knees when he slipped on ice and fell on both knees. Claimant again treated with Dr. Shields. After a period of conservative treatment, Dr. Shields performed surgery on claimant's left knee, a partial lateral meniscectomy done arthroscopically.
3. Dr. Shields opined that as a result of this injury, claimant sustained a 2 percent impairment to each lower extremity and Dr. Shields combined these ratings for a whole body rating of 2 percent.
4. Dr. Drazek opined that the February 20, 1997, injury resulted in 2 percent impairment to the right lower extremity and 8 percent impairment to the left extremity.
5. The Board concludes claimant has, as a result of the accident of February 1997, a whole body impairment of 4 percent. This conclusion is based on the opinion and rating by Dr. Drazek which, as to the right lower extremity, is supported by the testimony of Dr. Shields. Both Dr. Shields and Dr. Drazek opine that this injury caused 2 percent impairment to the right lower extremity. As with the December 1996 injury, Dr. Drazek is apportioning 25 percent of the total 8 percent impairment and this opinion is similarly speculative. But in this case, the opinion is also supported by the opinion of Dr. Shields and for that reason the Board agrees with and finds the impairment to be 2 percent of the right lower extremity.

As to the left lower extremity, the Board accepts as more consistent with the extent of the injury, the opinion of Dr. Drazek that claimant has an 8 percent impairment. The Board concludes the injury was more severe than Dr. Shields' rating recognizes.

The Board notes the ALJ has awarded 8 percent of the whole person for this injury and based this on Dr. Drazek. But as the Board understands Dr. Drazek's testimony, Dr. Drazek ultimately attributes a total of 6 percent of the whole person impairment to the work-related injuries. This consists of 8 percent to the left lower extremity and 6 percent work-related impairment to the right lower extremity. She has rated the total impairment for each extremity as 8 percent but for the right attributes 2 percent to the October 1996 injury that was not work related.

The Board's conversion of the lower extremity ratings is, as explained in the Conclusions of Law below, based on a 0.4 percent conversion factor used in the *AMA Guides to the Evaluation of Permanent Impairment*. As a result, Dr. Drazek's 8 percent of the left extremity equals 3.2 percent of the whole person and the 2 percent of the right for this February 1997 injury equals 0.8 percent for a total of 4 percent of the whole person.

### **Conclusions of Law**

1. Claimant is entitled to benefits based on a 4 percent permanent partial general disability for accidental injury that occurred on February 20, 1997. Functional impairment must, under the Act, be based on the *AMA Guides to the Evaluation of Permanent Impairment* (Fourth Edition). K.S.A. 44-510e. Section 3.2 of those *Guides* specifies that a lower extremity rating is converted to a whole body rating by multiplying 0.4 times the lower extremity rating. The Board has applied this conversion factor to the rating by Dr. Drazek to arrive at the 4 percent rating. Dr. Drazek did not make this specific conversion but other conversions done by Dr. Drazek indicate she was using this conversion method.
2. Claimant is also entitled to payment of medical expenses related to this injury, unauthorized medical expenses up to the statutory maximum, and future medical expenses upon proper application to and approval by the Director. K.S.A. 1999 Supp. 44-510.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on October 26, 1999, should be, and hereby is, modified to a 4 percent whole body impairment as to Docket No. 241,095.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William Edwards, and against the respondent, Sedgwick County, a qualified self-insured, for an accidental injury which occurred February 20, 1997, for 16.6 weeks at the rate of \$338 per week or \$5,610.80, for a 4% permanent partial disability, all of which is currently due and owing, less amounts previously paid.

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**Docket No. 241,096  
Findings of Fact**

1. On August 14, 1997, claimant injured his right upper extremity, neck, and right knee when he was pinned by an automatic door at the Sedgwick County Detention Facility. For these injuries, claimant treated with Dr. Robert L. Eyster. Claimant had undergone discectomy at C5-6 and C6-7 in 1986. The 1986 surgery was preformed by Dr. John Hered. For the August 1997 injury, Dr. Eyster diagnosed muscular ligamentous irritation of a preexisting fusion and degenerative changes of the neck.

2. Dr. Eyster referred claimant to Dr. Abay who determined claimant was not a surgical candidate. Dr. Eyster ultimately rated claimant's impairment for this injury as 15 percent of the whole person but gave somewhat contradictory testimony about the cause of this impairment. Dr. Eyster testified that claimant suffered no permanent impairment for the work injury, but he also testified that of the 15 percent impairment, 95 percent resulted from preexisting disc disease, apparently leaving the remaining 5 percent as caused by the work injury or otherwise unexplained.

3. Dr. Drazek found limited range of motion in both the shoulder and the neck. Dr. Drazek rated the injury from the August 14, 1997 accident as 15 percent of the whole person consisting of 10 percent for the cervical injury and 5 percent for the shoulder injury.

Dr. Drazek also recommended restrictions: avoid prolonged standing, walking climbing, kneeling, or squatting. Claimant should also avoid activity that would require turning of the head or neck, cervical extension, and overuse of the right upper extremity. Lifting restrictions should include avoidance of lifting greater than 20 to 25 pounds on a repetitive basis and 40 to 45 pounds on an occasional basis. The kneeling and crouching restrictions are for the knees. The weight limitations are for the neck and shoulder.

Dr. Drazek opined that claimant would be unable to perform 11 of 29, or 38 percent, of the tasks from the list prepared by Mr. Jerry D. Hardin.

4. The Board finds, based on Dr. Drazek's testimony, that the accident of August 14, 1997, caused a 15 percent whole body impairment. This is based on injury to the neck and shoulder. Dr. Drazek also attributes 2 percent of the right lower extremity impairment to this accident, but claimant has not argued here for its inclusion and the Board has found the apportionment among the various accidents was speculative.

5. Following the injury, respondent provided accommodated work handling the Court assignment book.

6. Claimant retired effective December 1, 1998, and the Board finds the retirement was because of his work-related injuries. Respondent informed claimant that the accommodated position would not be permanent and, based on the testimony of Captain Bryan Brimer, encouraged claimant to retire. Captain Brimer suggested claimant consider retirement and mentioned the possibility that he might be terminated. In addition, the Board concludes claimant could not have, consistent with his work restrictions, qualified to carry a firearm. Claimant testified that he could not, and while there is some dispute about whether his work restrictions would absolutely have prevented him, the Board accepts as true claimant's testimony that he could not.

There clearly were restrictions against kneeling and squatting. Dr. Eyster recommended no repetitive kneeling or squatting. Dr. Drazek restricted against prolonged kneeling or squatting. Nothing in the record contradicts claimant's conclusion that he could not qualify to carry a firearm and/or establishes he could qualify consistently with these restrictions. Certainly, the Board concludes claimant had a good faith belief that he could not qualify.

Respondent has offered evidence that it has some work that does not require qualification with a firearm. Respondent mentions two specific jobs. But nothing in the record suggests these jobs were, or would have been, available to claimant. Respondent rather suggests that it was claimant's responsibility to ask for those jobs and his failure to do so is fatal to the work disability claim. The appellate court has encouraged claimants to seek accommodated work. *Lowmaster v. Modine Manufacturing Co*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* \_\_\_ Kan. \_\_\_ (1998). Claimant is not, however, in all cases required to request accommodated work. Whether the claimant requests accommodated work is only one factor. *Oliver v. The Boeing Company-Wichita*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* \_\_\_ Kan. \_\_\_ (1999). In this case, respondent knew of claimant's limitation but apparently did not offer work and, instead, discussed retirement as a logical option. Under these circumstances, the fact claimant did not seek other accommodation does not suggest the absence of good faith or otherwise disqualify him from work disability.

7. On February 24, 1999, claimant secured employment with Dillons Stores as a security officer and in that job earned \$10.50 per hour for a 40-hour week, plus fringe benefits.

8. The parties have stipulated that claimant's weekly retirement benefit is \$421.60 and that one-half of this amount is attributable to contributions made by the claimant.

9. Based on the testimony of Dr. Hered, the Board finds claimant had, before this injury, 7 percent impairment to the body as a whole as a result of prior neck injury and surgery. Dr. Hered testified the rating would be 7 percent based on the diagnosis and surgery without residuals. He also testified there were residuals but did not testify to any percentage of impairment to be added for the residuals.

### Conclusions of Law

1. The Board concludes claimant sustained a 15 percent permanent partial disability to the body as a whole as a result of the August 14, 1997 accident. This conclusion is based on the functional impairment rating by Dr. Drazek. K.S.A. 1999 Supp. 44-510e.

2. The preexisting functional impairment of 7 percent must be deducted from the 15 percent to arrive at the percentage to be used in awarding benefits. K.S.A. 1999 Supp. 44-501(c) requires that any award be reduced by the amount of preexisting impairment.

3. So long as the claimant is earning a wage that is 90 percent or greater than the wage the claimant was earning at the time of the accident, the disability must be limited to the extent of the functional impairment only. K.S.A. 1999 Supp. 44-510e. In this case, claimant continued to earn such a wage until January 1, 1998. Therefore, from the date of accident to December 1, 1998, claimant is entitled to benefits based on an 8 percent disability only.

4. From and after December 1, 1998, claimant is entitled to a work disability. The Board has found claimant retired because of the work-related injuries. The fact claimant retired does not preclude an award of work disability. *Graf v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

5. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was



earning at the time of the injury and the average weekly wage the worker is earning after the injury.

6. Claimant has a 38 percent task loss based on the opinion of Dr. Drazek, the only physician to give a task loss opinion in this case, and a 47 percent wage loss. The wage loss has been calculated by comparing the stipulated average weekly wage of \$792.62 to the wage claimant earned at Dillons after leaving employment with respondent.

7. The 38 percent task loss and 47 percent wage loss average to a 42.5 percent work disability. From this figure, the 7 percent preexisting disability must be deducted according to K.S.A. 1999 Supp. 44-501(c). Claimant is then entitled to benefits based on a 35.5 percent disability.

8. The employer is entitled to receive a credit pursuant to K.S.A. 44-501(h) for retirement benefits attributable to contributions by the employer. In this case, according to stipulation of the parties, the amount of the credit is \$210.80 per week. Accordingly, the weekly benefit is \$140.20.

9. Claimant will, therefore, be entitled to benefits based on an 8 percent disability while earning a comparable wage, that is until December 1, 1998. The final disability is, however, a 35.5 percent work disability and claimant is, as of December 1, 1998, entitled to benefits for a 35.5 percent work disability with the weeks paid during the period of 8 percent disability to be deducted from the weeks to be paid for the 35.5 percent work disability. *Deist v. Dillon Companies, Inc.*, WCAB Docket No. 213,485 (December 1999).

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on October 26, 1999, should be, and hereby is, modified to a 35.5 percent whole body impairment as to Docket No. 241,096.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William Edwards, and against the respondent, Sedgwick County, a qualified self-insured, for an accidental injury which occurred August 14, 1997, and based upon an average weekly wage of \$792.63, for 33.2 weeks at the rate of \$140.20 per week or \$4,654.64, for an 8% permanent partial disability until December 1, 1998, followed by 114.13 weeks at the rate of \$140.20, or \$16,001.03, for a 35.5% work disability, for a total award of \$20,655.67.

As of May 31, 2000, there is due and owing claimant 145.86 weeks of permanent partial disability compensation at the rate of \$140.20 per week in the sum of \$ 20,449.57, which is ordered paid in one lump sum less any amounts previously paid. The remaining

balance of \$206.09 is to be paid for 1.47 weeks at the rate of \$140.20 per week, until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul V. Dugan, Jr., Wichita, KS  
E. L. Lee Kinch, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director